



1 HUBEL, Magistrate Judge:

2 The plaintiff Michelle Andexler brings this action against the  
3 defendant Michael T. Clarke for damages under the federal Fair Debt  
4 Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. § 1692  
5 *et seq.*<sup>1</sup> In her Complaint, Andexler alleges Clarke attempted to  
6 collect a judgment obtained against her by Fred Butcher. The  
7 judgment was obtained by default. Andexler claims a portion of the  
8 judgment represented a "lease buyout fee" that Butcher "was not  
9 allowed to charge" and was an "unlawful penalty." She claims  
10 Clarke chose to pursue collection of the entire judgment amount,  
11 even though he "could have refused to collect the unlawful  
12 portion," violating 15 U.S.C. § 1692f(1).<sup>2</sup>

13 Andexler further claims Clarke filed a writ of garnishment  
14 against her, and then failed to provide her with proper notice of  
15 her right to object to the garnishment as required by Oregon  
16 Revised Statutes § 18.845. Instead, Clarke provided a form of  
17 notice "apparently designed for debtors who owe tax debts." Dkt.  
18 #1, ¶¶ 10 & 11, & Ex. A. Andexler seeks actual and statutory  
19 damages and attorney's fees under the FDCPA. Dkt. #1.

20 The matter is before the court on Clarke's motion for summary  
21 judgment. Dkt. #19. The motion is supported by a brief, Dkt. #20;  
22 a statement of facts, Dkt. #21; and Declarations of Michael T.  
23 Clarke, Erin A. Fennerty, and Scott Mollenhour, Dkt. ## 22, 23 and  
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25 <sup>1</sup>The parties have consented to jurisdiction and the entry of  
26 final judgment by a United States Magistrate Judge, in accordance  
with Federal Rule of Civil Procedure 73(b). Dkt. #27.

27 <sup>2</sup>A debt collector violates the FDCPA by collecting any amount  
28 that is not "expressly authorized by the agreement creating the  
debt or permitted by law." 15 U.S.C. § 1692f(1).

24, respectively. Andexler has responded with a brief, Dkt. #31, accompanied by a copy of the Writ of Garnishment obtained against her on Butcher's behalf. Dkt. #31 & 31-1. Clarke has filed a reply, Dkt. #34; a Declaration of David A. Jacobs, Dkt. #35; and a Supplemental Declaration of Michael T. Clarke, Dkt. #36. The motion came on for oral argument on June 15, 2011. The court has considered the parties' summary judgment papers and counsels' oral arguments, and **grants** the motion for summary judgment.

### ***DISCUSSION***

Clarke's motion and Adexler's response bring a single issue before the court; i.e., whether Clarke qualifies as a "debt collector" for purposes of the FDCPA. The parties do not dispute that the judgment Clarke attempted to collect constituted a "debt" for purposes of the FDCPA (although Andexler disputes the validity of a portion of the debt). The Act defines a "debt collector" as:

any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts or who regularly collects or attempts to collect, directly or indirectly, debts owed or due another.

15 U.S.C. § 1692a(6).

"[L]awyers who regularly collect debts through litigation" are included within the statutory definition of "debt collector." *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011) (citing *Heintz v. Jenkins*, 514 U.S. 291, 293-94, 115 S. Ct. 1489, 1490, 11 L. Ed. 2d 395 (1995); see *id.*, 514 U.S. at 299, 115 S. Ct. at 1493 (FDCPA "applies to attorneys who

1 'regularly' engage in consumer-debt-collection activity, even when  
2 that activity consists of litigation.").

3 Clarke, however, argues he does not qualify as a "debt  
4 collector" as defined by the statute because at the time of the  
5 alleged violation, he had been practicing law for less than five  
6 years during which time he had handled only ten consumer debt  
7 collections for nine different clients, five of whom were his  
8 family members or friends. He claims he "has no ongoing rela-  
9 tionships with clients that have retained him specifically to  
10 handle consumer debt collections," and he only occasionally handles  
11 debt collection matters as part of his small, generalized law  
12 practice. Dkt. #20; see Dkt. #22, Clarke Declr.

13 Clearly, the principal purpose of Clarke's business is not the  
14 collection of debts. Thus, the question turns on whether Andexler  
15 can show Clarke "regularly collects or attempts to collect"  
16 consumer debts. See *Goldstein v. Hutton, Ingram, Yuzek, Gainen,*  
17 *Carroll & Bertolotti*, 374 F.3d 56, 60-61 (2d Cir. 2004) (FDCPA  
18 plaintiff "bears the burden of proving the defendant's debt  
19 collector status").

20 Andexler complains that she "had no direct access to  
21 [Clarke's] files and therefore has no opportunity to meaningfully  
22 challenge the evidence provided by [Clarke] regarding the amount of  
23 [his] practice devoted to collection activity." Dkt. #31, p. 1.  
24 Clarke takes issue with Andexler's representation. He notes that  
25 early on in the case, "with the court's encouragement, the parties  
26 resolved a dispute over what information would be provided to  
27 [Andexler] from [Clarke's] client files in such a way [as] to  
28 protect attorney-client confidences." Dkt. #34, p. 1; see Dkt.

1 #35, Declr. of David A. Jacobs (describing discussions with the  
2 court at the parties' Rule 16 conference and subsequent status  
3 conference). Pursuant to the parties' agreement, attorney Erin A.  
4 Fennerty conducted a comprehensive review of Clarke's client files  
5 and email correspondence, and prepared a listing of the types of  
6 work he had performed for each of his clients for calendar years  
7 2006 through 2010. See Dkt. #23, Fennerty Declr. This information  
8 was provided to Andexler, who then deposed Clarke. According to  
9 Clarke, Andexler did not have his deposition transcribed; she  
10 pursued no further discovery subsequent to his deposition; and, to  
11 Clarke's knowledge, she did not depose, or subpoena documents from,  
12 any of the clients for whom he has performed consumer collection  
13 work. Dkt. #34.

14 Andexler "challenge[s] the accuracy, or at least the  
15 materiality, of [Clarke's] representation that he does not  
16 currently represent any of the clients for which he has done  
17 collection work on an ongoing basis." Dkt. #31, p. 1 (citing Dkt.  
18 #21, ¶ 3). She argues Fennerty's file review suggests Clarke  
19 performed ongoing collection activities for at least three clients;  
20 i.e., Modern Appraisal, "Northwest Plumbing," and Vilardi Electric.  
21 *Id.* (referring to Dkt. #23, ¶ 9(i), (q), & (s)). Andexler suggests  
22 it is immaterial whether or not Clarke still represented any of  
23 those three clients at the time of his Declaration; rather, "[w]hat  
24 would be material is information regarding the nature of [Clarke's]  
25 arrangement with those parties as of the date that [he] performed  
26 the collection actions that are the subject of this lawsuit." *Id.*

27 Concerning the three clients cited by Andexler, Fennerty's  
28 review of Clarke's records shows he pursued three matters on behalf

1 of Vilardi Electric. One clearly was not a consumer matter, as it  
2 involved a contract between Vilardi and another business. The  
3 other two matters were to collect payment due under contracts for  
4 the performance of residential electrical work. In one of those,  
5 no lawsuit was filed. In the other, a lawsuit was filed for breach  
6 of contract. See Dkt. #23, ¶ 9(i).

7 For Modern Appraisal, Clarke undertook seven collection  
8 matters, only one of which involved a consumer defendant. Five of  
9 the matters involved collections from mortgage companies for the  
10 performance of home appraisals. The last action also involved a  
11 commercial client, not a consumer. *Id.*, ¶ 9(q).

12 For SRDH Plumbing, Inc. dba Northwest Plumbing, Clarke  
13 undertook two consumer collection actions to recover payment due  
14 under contracts for the performance of plumbing services. *Id.*,  
15 ¶ 9(s).

16 In Clarke's supplemental declaration, he makes it clear that  
17 throughout his legal career, he has never had any ongoing  
18 relationship with any client to handle consumer collection work,  
19 nor has any client ever agreed to send him collection work  
20 "whenever they had the need." Dkt. #36, ¶ 1.

21 The question here is whether Clarke's debt collection  
22 activities are sufficient to satisfy the regularity prong of the  
23 definition of "debt collector." The Ninth Circuit has only  
24 addressed the issue once. In *Fox v. Citicorp Credit Services,*  
25 *Inc.*, the court held, with little analysis, that an attorney whose  
26 practice during the period in question included 80 percent debt  
27 collection work was a "debt collector" for purposes of the Act.  
28 *Id.*, 15 F.3d 1507, 1513 (9th Cir. 1994).

1 More instructive on the issue is the court's analysis in  
2 *Goldstein*. There, the court reviewed the issue thoroughly, and  
3 found that in determining whether an attorney qualifies as a "debt  
4 collector" for purposes of the FDCPA, the court's focus cannot be  
5 limited to "the proportion of overall work or firm revenue," a  
6 narrow view that "blurs the distinction between the 'principal  
7 purpose' and 'regularity' aspects of the statutory definition of  
8 debt collector." *Goldstein*, 374 F.3d at 61. The court observed as  
9 follows:

10 To the extent that some courts confronted  
11 with the task of articulating an analytical  
12 framework for the regularity prong of the  
13 definition have suggested that such propor-  
14 tionality factors may alone be determinative,  
15 the facts of the particular cases often belie  
16 the implication. Where debt collector status  
17 was found lacking based on revenue or workload  
18 figures, other indicia of regularity often  
19 were also lacking; where debt collector status  
20 was found, the regularity and/or principal  
21 purpose criteria would in some cases easily  
22 have been met in any event. *Compare Schroyer*  
23 *v. Frankel*, 197 F.3d 1170, 1173, 1177 (6th  
24 Cir. 1999) (where firm handled 50-75 collec-  
25 tion cases annually, constituting less than 2%  
26 of overall practice, maintained no non-  
27 attorney staff or computer aids for debt  
28 collection, and debt collection activity came  
from non-collection business clients and was  
"incidental to, and not relied upon or antici-  
pated in," firm's practice of law, firm was  
not debt collector); *White [v. Simonson &*  
*Cohen P.C.]*, 23 F. Supp. 2d [273,] 278  
[(E.D.N.Y. 1998)] (lawyer who sent 35  
collection letters once as favor to personal  
client and filed no follow-up litigation was  
not debt collector); *Von Schmidt v. Kratter*, 9  
F. Supp. 2d 100, 103-04 (D. Conn. 1997) (law  
firm whose total three-year revenues from debt  
collection were less than \$1,000 and had only  
one consumer credit client was not debt  
collector); and *Nance v. Petty, Livingston,*  
*Dawson, & Devening*, 881 F. Supp. 223, 225  
(W.D. Va. 1994) (collection work that  
constituted .61% of lawyer's personal practice  
and represented 1.07% of firm's cases over 18-

1 month period did not render defendant law firm  
2 debt collector, where plaintiff provided no  
3 evidence of debt collection activity other  
4 than that complained of in action); *with Scott*  
5 *v. Jones*, 964 F.2d 314, 316-18 (4th Cir. 1992)  
6 (principal purpose and regularity prongs  
7 satisfied where lawyer and firm had regular  
8 ongoing relationship with delinquent debt  
9 division of credit card issuer, 70-80% of  
10 revenues were generated by such work over  
11 relevant period and over 4,000 "warrants" had  
12 been issued annually in connection with such  
13 work over five-year period). *See also Garrett*  
14 [*v. Derbes*, 110 F.3d 317, 318 (5th Cir.  
15 1997)], (rejecting district court finding that  
16 collection activity was not "regular" where  
17 639 demand letters were mailed in nine-month  
18 period, although revenues from activity were  
19 less than 0.5% of firm's total for period).  
20 In light of Goldstein's proffer of specific  
21 evidence of debt collection activity in the  
22 form of 145 three-day notices issued in a one-  
23 year period, the district court's analysis was  
24 too narrow to support its determination that  
25 Hutton had not regularly engaged in debt  
26 collection.

27 *Goldstein*, 374 F.3d at 61-62.

28 The court rejected Goldstein's assertion that if any attorney  
engages in collection activities for clients "more than a handful  
of times per year," the attorney must comply with the FDCPA. *Id.*,  
374 F.3d at 62 (citation omitted). The court found, "Goldstein's  
'handful' standard has no precedential basis and, standing alone,  
lacks a meaningful nexus to the issue of regularity." *Id.* Instead,  
the court held the determination must be made "on a case-by-case  
basis in light of factors bearing on the issue of regularity." *Id.*  
The court found the following factors to be "illustrative rather  
than exclusive":

Most important in the analysis is the  
assessment of facts closely relating to  
ordinary concepts of regularity, including (1)  
the absolute number of debt collection commu-  
nications issued, and/or collection-related



1 litigation matters pursued, over the relevant  
2 period(s), (2) the frequency of such communi-  
3 cations and/or litigation activity, including  
4 whether any patterns of such activity are  
5 discernable, (3) whether the entity has  
6 personnel specifically assigned to work on  
7 debt collection activity, (4) whether the  
8 entity has systems or contractors in place to  
9 facilitate such activity, and (5) whether the  
10 activity is undertaken in connection with  
11 ongoing client relationships with entities  
12 that have retained the lawyer or firm to  
13 assist in the collection of outstanding  
14 consumer debt obligations. {Footnote omit-  
15 ted.] Facts relating to the role debt collec-  
16 tion work plays in the practice as a whole  
17 should also be considered to the extent they  
18 bear on the question of regularity of debt  
19 collection activity (debt collection consti-  
20 tuting 1% of the overall work or revenues of a  
21 very large entity may, for instance, suggest  
22 regularity, whereas such work constituting 1%  
23 of an individual lawyer's practice might not).  
24 Whether the law practice seeks debt collection  
25 business by marketing itself as having debt  
26 collection expertise may also be an indicator  
27 of the regularity of collection as a part of  
28 the practice.

16 *Goldstein*, 374 F.3d at 62-63.

17 In the present case, Andexler asserts that Clarke "derived  
18 .97% of [his] revenue from collection practices," while the  
19 defendant in *Goldstein* who was found to be a "debt collector"  
20 derived only .05% of its overall revenue from collection activi-  
21 ties. Dkt. #31, p. 9. However, the *Goldstein* court's holding was  
22 based on more than just the percentage of revenue. The defendant  
23 in the case was shown to have issued 145 debt collection notices in  
24 a twelve-month period, with more than ten notices issued in each of  
25 at least seven months and more than fifteen notices issued in three  
26 months. The court found that these numbers, "taken together with  
27 the repetitive pattern of issuance of multiple notices each month,  
28 clearly could support a determination that [the defendant's] debt

1 collection practices were regular." *Id.*, 374 F.3d at 63. In  
2 addition, the record showed the defendant had an ongoing  
3 relationship with "apparently affiliated entities for which it  
4 repeatedly sent collection notices within the one-year period under  
5 scrutiny[.]" *Id.* The evidence here is not as compelling. There  
6 is no evidence in the record that Clarke engaged in a similar  
7 magnitude of collection activities, or that he had an ongoing  
8 relationship to collect debts for any particular client.

9 Summary judgment should be rendered "if the movant shows that  
10 there is no genuine dispute as to any material fact and the movant  
11 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
12 56(c)(2). Clarke has shown there is an absence of evidence to  
13 support Andexler's case. Accordingly, the burden shifts to  
14 Andexler "to designate specific facts demonstrating the existence  
15 of genuine issues for trial." *In re Oracle Corp. Securities*  
16 *Litigation*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp.*  
17 *v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d  
18 265 (1986)). The Ninth Circuit has explained that "[t]his burden  
19 is not a light one":

20 The non-moving party must show more than the  
21 mere existence of a scintilla of evidence.  
22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
23 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).  
24 The non-moving party must do more than show  
25 there is some "metaphysical doubt" as to the  
26 material facts at issue. *Matsushita Elec.*  
27 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475  
28 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d  
528 (1986). In fact, the non-moving party  
must come forth with evidence from which a  
jury could reasonably render a verdict in the  
non-moving party's favor. *Anderson*, 477 U.S.  
at 252, 106 S. Ct. 2505. In determining  
whether a jury could reasonably render a  
verdict in the non-moving party's favor, all

1           justifiable inferences are to be drawn in its  
2           favor. *Id.* at 255, 106 S. Ct. 2505.

3   *Id.*

4           In the present case, a review of the factors identified by the  
5   *Goldstein* court leads to the conclusion that Clarke is not a "debt  
6   collector" for purposes of the FDCPA. Moreover, Andexler has  
7   failed to "make a showing sufficient to support a determination  
8   that [Clarke] was a debt collector" at the time he obtained the  
9   writ of garnishment on Butcher's behalf. See *Goldstein*, 374 F.3d  
10   at 60-61. She has offered no citations to materials in the record  
11   that establish Clarke was (or is) a "debt collector," nor has she  
12   offered evidence to establish the existence of a material issue of  
13   fact. Even taking all justifiable inferences in Andexler's favor,  
14   she has failed to "come forth with evidence from which a jury could  
15   reasonably render a verdict in [her] favor." *In re Oracle Corp.*,  
16   627 F.3d at 387 (citation omitted). Cf. *Ashcroft v. Iqbal*, 556  
17   U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009) (noting Rule 8's pleading  
18   standard "demands more than an unadorned, the-defendant-unlawfully-  
19   harmed-me accusation") (citing *Bell Atlantic Corp. v. Twombly*, 550  
20   U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)).  
21   I find that Clarke was not a "debt collector" for purposes of  
22   liability under the FDCPA.

**CONCLUSION**

For the reasons discussed above, Clarke's motion for summary judgment (Dkt. #19) is **granted**.

IT IS SO ORDERED.

Dated this 20th day of June, 2011.

/s/ Dennis J. Hubel

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Dennis James Hubel  
Unites States Magistrate Judge